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IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1962

No. 348

EVELYN LUNDBERG, Administratrix of the Estate of Stanley A. Lundberg, Deceased,

Petitioner,

vs.

ROSE FUEL & MATERIALS, INCORPORATED,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Evelyn Lundberg prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the above entitled case on April 23, 1962.

CITATIONS TO OPINIONS BELOW.

The judgment of the district court was entered on the verdict of the jury. No opinion was written. The opinion of the Court of Appeals is reported in 302 F. 2d 825, and is reprinted in Appendix A, *infra*, p 11.

JURISDICTION.

The judgment of the Court of Appeals was entered on April 23, 1962. A petition for rehearing was timely filed. It was denied on May 23, 1962. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTION PRESENTED.

The petitioner, plaintiff in an action to recover for herself and her children for the wrongful death of her husband, appealed to the court of appeals from a judgment entered on a general verdict in favor of the respondent, the defendant below. In the court of appeals she contended that the trial judge erred in refusing her request that he charge the jury in terms of her specific theory of recovery, which was that the respondent's driver was obliged to maintain a proper lookout in his operation of a tractor-trailer which collided with her decedent's automobile. The court of appeals found that there was evidence sufficient to sustain the petitioner's theory and that the refusal of the trial court to give her requested charge was error. It nevertheless held, with one of the three judges dissenting, that the error was harmless because the jury answered interrogatories submitted with the case in a manner consistent with its general verdict.

The question presented is: May the trial court's error in failing to instruct the jury as to the law applicable to the case under the evidence and in failing to tender petitioner's requested charge embodying her theory of recovery be properly termed harmless error because the jury answered interrogatories submitted with the request for a general verdict in a matter consistent with its general verdict?

PROVISIONS, STATUTES AND REGULATIONS INVOLVED.

1. United States Constitution, Amendment VII:

"In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

2. Title 28, United States Code, section 2111:

"Harmless Error. On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."

3. Federal Rule of Civil Procedure 61, *Harmless Error.*

"No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

STATEMENT OF FACTS.

The petitioner commenced this action in the United States District Court for the Northern District of Indiana to recover damages for herself and her children for the wrongful death of her husband. The District Court had jurisdiction of the action under Title 28 U.S.C., Section 1332, the petitioner being a citizen of the State of Michigan and the respondent being a corporation incorporated under the laws of the State of Indiana and having its principal place of business in Indiana and the sum in controversy exceeding ten thousand dollars ($10,000.00), exclusive of interest and costs.

The petitioner's husband was killed in a head-on collision between the automobile which he was driving and a truck operated by the respondent's driver. The collision occurred on a straight road under conditions of clear visibility. The petitioner introduced evidence which tended to show that the collision resulted when the respondent's driver veered his truck into the lane lawfully occupied by the oncoming automobile driven by the petitioner's husband.

The respondent's driver testified that he veered his truck sharply toward the lane of traffic which the petitioner's husband was lawfully entitled to occupy in order to avoid a collision because the petitioner's husband had been occupying the driver's proper lane immediately before the collision.

At the close of the evidence, the petitioner requested the court to instruct the jury that the failure of a driver to maintain a proper lookout would constitute negligence, and that if it found that the respondent's driver failed to maintain a proper lookout and that such failure caused the collision in question, it should find for the petitioner. (In-

structions Nos. 9 and 10, Appellant's Appendix, p. 21.) The court refused to give the instructions for the reason that it found no evidence to support the contention that the respondent's driver failed to keep a proper lookout.

The case was submitted to the jury for its general verdict. With the request for a general verdict, the court, at the request of the respondent and over the objection of the petitioner, submitted to the jury for its answers the following interrogatories.

> "1. As the passenger car operated by the deceased approached the scene of the accident, was it at any time in the northbound lane of traffic?
>
> "2. If your answer to the foregoing interrogatory is in the affirmative, did the deceased immediately before the collision turn his motor vehicle from the northbound lane of traffic on to or across the center line of the highway?
>
> "3. Did the defendant's driver turn to his left onto or across the center line of the highway immediately before the collision?" (Appellant's Appendix, pp. 22-23.)

The jury returned a general verdict for the respondent. It answered each of the above interrogatories in the affirmative.

From the judgment of the district court entered on the verdict of the jury, the petitioner appealed. She contended that the evidence in the case entitled her to her requested charges respecting the duty of the respondent's driver to maintain a proper lookout.

Each of the three judges on the panel of the Seventh Circuit which heard the appeal wrote an opinion in the case. (Appendix A, *infra*.) Two of the judges held that the trial court was in error in failing to charge in accordance with the petitioner's request because the petitioner's evidence of

the question of the respondent's driver's failure to keep a proper lookout was sufficient to present a question for the jury. Further, the majority opinion recognized that the issue as to whether the respondent's driver had kept a proper lookout was "the basic factual question at the trial." Nevertheless, one of the two judges who were of the opinion that the failure of the trial court to give any charge on the issue of failure to keep a proper lookout constituted error held that the error did not affect a substantial right of the petitioner. He so held solely because the jury answered the accompanying interrogatories in a manner consistent with the respondent's driver's account of the collision. The vote of this judge combined with the vote of the third judge, who found no error in the charge, to result in a 2-1 vote for affirmance of the judgment.

REASONS FOR GRANTING THE WRIT.

1. The decision of the Court of Appeals for the Seventh Circuit in this case effectively deprives the petitioner of her right to trial by jury guaranteed by the Seventh Amendment to the Constitution. "Maintenance of the jury as a fact finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." *Dimick* v. *Schiedt*, 292 U.S. 474, 486; *Beacon Theatres* v. *Westover*, 359 U.S. 500, 501.

The right to trial by jury in a case submitted to the jury for its general verdict clearly includes the right to trial by a jury correctly instructed as to the law applicable to the evidence. In this case the Seventh Circuit Court of Appeals has unequivocally held that the jury was not correctly instructed as to the law applicable to the evidence. Further, it was held that the error in the failure to give the requested instructions went to the "basic factual question at the trial." (Majority opinion, Appendix A, *infra*, pp. 12-13) The Seventh Circuit nevertheless condones this clear violation of the petitioner's right to a trial by a jury correctly informed of the law applicable to the evidence and of the petitioner's contentions with respect to that evidence solely because the jury, sent to its deliberations without benefit of the law favorable to the plaintiff or of her contentions as to its applicability under the evidence, returned a general verdict for the respondent and answered interrogatories in a manner consistent with its verdict.

The Seventh Circuit has here held that a jury may be allowed to deliberate entirely in the dark with respect to the law or to the plaintiff's factual contentions as long as

the product of its deliberation includes along with a general verdict answers to interrogatories which are consistent with the general verdict. This holding destroys the reason for the settled rule in jury trial actions in federal courts that both parties are entitled to have their factual theories presented to the jury and that it is reversible error to submit the theory of one party and not call attention to the main points of the opposite party's case. *Montgomery* v. *Virginia Stage Lines*, 191 F. 2d 770, 772 (CA DC, 1951); *Chicago & N.W. Ry. Co.* v. *Green*, 164 F. 2d 55, 61 (CA 8, 1947); *Home Ins. Co.* v. *Consolidated Bus Lines*, 179 F. 2d 768 (CA 4, 1950); *Klas* v. *Yellow Cab Co.*, 106 F. 2d 935, 937 (CA 7, 1939). The obvious reason for that rule is that elementary fairness requires that the jury be sent to its deliberation alerted to the contentions of both parties with respect to the legal significance of the evidence. If the jury is alerted to one party's contentions only, it surely cannot be said that the adverse party was not deprived of a substantial right merely because the jury, in finding in favor of the only party whose contentions were forcefully and immediately put before it at the critical stage of the court's charge, answered interrogatories consistent with its general finding.

2. The decision of the Seventh Circuit in this case is in conflict with the general holding in other circuits, and in the Seventh Circuit as well, that, as the Fourth Circuit has stated it:

> "The trial judge may, of course, express an opinion upon the facts; but he may not withdraw material evidence from the jury; and it is reversible error to submit the evidence and theory of one party prominently and fully, as was done here, and not call attention to the main points of the opposite party's case." *Home Insurance Co.* v. *Consolidated Bus Lines*, 179 F. 2d 768 (CA 4, 1950).

The following decisions are in accord: *Montgomery* v. *Virginia Stage Lines*, 191 F. 2d 770, 772 (CA DC, 1951); *Chicago & N.W. Ry. Co.* v. *Green*, 164 F. 2d 55, 61 (CA 8, 1947); *Klas* v. *Yellow Cab Co.*, 106 F. 2d 935, 937 (CA 7, 1939).

What the trial court did in this case, as the majority of the Seventh Circuit Court of Appeals recognized in the opinions, was not simply to fail to "call attention to the main points of the opposite party's (petitioner's) case," but to fail utterly to apprise the jury either of the petitioner's theory of her case or of the law upon which she might recover.

The Court of Appeals nevertheless affirmed the judgment of the trial court. The majority opinion predicates affirmance upon Federal Rule of Civil Procedure 61, entitled "Harmless Error." The petitioner suggests that inasmuch as the rule is invoked at the level of the court of appeals the authority invoked by that court is Title 28, U.S.C., Section 2111, also entitled "Harmless Error." But with respect to the issue raised in this petition the question of whether Rule 61 or Section 2111 is applicable is without significance. Both provisions express the policy that error should not undo the result of a trial if it does not "affect the substantial rights of the parties."

But neither Rule 61 nor 28 U.S.C. 2111 can justify the action of the Court of Appeals in affirming the judgment of the district court in the instant case. The error complained of in this case is radical. The trial court although requested to do so failed to charge the jury with respect to the petitioner's factual theory of recovery and failed to advise the jury of the law with respect to the standard of care required of the respondent's servant. Its failure to do so effectively deprived the petitioner of an essential inci-

dent to her right to trial by jury. The disregard of error so substantial by application of the harmless error doctrine is such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

MAURICE N. FRANK,
GEORGE S. KELLER,
BENJAMIN PISER,
Counsel for Petitioner.

APPENDIX A — OPINIONS BELOW.

In The
UNITED STATES COURT OF APPEALS
For The Seventh Circuit

No. 13521 September Term, 1962 January Session, 1962

Evelyn Lundberg, Administratrix of the Estate of Stanley A. Lundberg, Deceased,
Plaintiff-Appellant,
v.
Rose Fuel & Materials, Inc.,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Indiana, South Bend Division.

April 23, 1962

Before HASTINGS, *Chief Judge*, SCHNACKENBERG and KILEY, *Circuit Judges.*

KILEY, *Circuit Judge.* This is a diversity wrongful death action based on a collision between defendant's tractor trailer and a passenger automobile driven by plaintiff's decedent. Verdict and judgment were for defendant, and plaintiff has appealed.

The collision occurred about 5:30 a.m. on State Road No. 219, a two-lane highway, south of its junction with State Road No. 20 near Osceola, Indiana. The tractor trailer was north bound in the east lane and decedent's

car south bound in the west lane. Decedent and his two passengers were killed instantly.

The only question on appeal is whether the District Court committed reversible error in refusing to give instructions upon plaintiff's theory that the collision occurred because defendant's driver negligently failed to keep a proper lookout, proximately causing the death of plaintiff's decedent.

Plaintiff tendered two instructions on its theory. One was a general statement of the duty of an operator of a motor vehicle to maintain a reasonable lookout "for other traffic on the highway," and that failure to do so was negligence. The other instruction was peremptory, applying the general rules to the case at bar.

The District Court found no evidence to support the proffered instructions. We think this was error. Taking as true the evidence favorable to plaintiff and drawing legal inferences in her favor, *Hower* v. *Roberts*, 8 Cir., 153 F. 2d 726, 727 (1946), we find evidence to support plaintiff's theory of failure of defendant's driver to maintain a proper lookout. It follows that plaintiff was entitled to have the instructions given on that theory. *Montgomery* v. *Virginia Stage Lines*, D.C. Cir., 191 F. 2d 770, 772 (1951); *Klas* v. *Yellow Cab Co.*, 7 Cir., 106 F. 2d 935, 937 (1939). For the reasons given hereinafter, we need not detail the evidence supporting the instructions.

Despite the conclusion that the District Court erred in refusing to give the instructions proffered by plaintiff on "proper lookout," the judgment must be affirmed.

The basic factual question at the trial was whether decedent, under defendant's theory, was in the wrong north

bound lane just before the collision so as to give rise to an emergency in which the truck driver had to decide within three seconds how to avoid decedent's car coming toward him on a collision course; or whether decedent's car, under plaintiff's theory, was in the right south bound lane into which the fatigued truck driver, failing to keep a proper lookout, veered into the wrong south bound lane.

The jury was properly instructed on the law of Indiana on this question, that is, a person who drives on the wrong side of a highway is guilty of negligence unless he shows justification or excuse. *Burns Ind. Stat.* §47-2010 (1961 Supp.); *Gamble* v. *Lewis*, 227 Ind. 455, 85 N.E. 2d 629, 633 (1949); *Freeport Motor Cas Co.* v. *Chafin*, ... Ind. App. ...., 170 N.E. 2d 698 (1960).

In special interrogatories the jury found that decedent's car was at some time in the wrong north bound lane as it "approached the scene," and that "immediately before the collision" he turned his car from the north bound lane "on to or across the center line;" and that defendant's driver turned to "his left onto or across the center line • • • immediately before the collision." These interrogatories are founded on testimony of the truck driver and his testimony gives substantial support to the affirmative answers. The jury presumably found decedent on the wrong side of the road and no showing is made of justification or excuse.

The special finding, not contested as such here, definitively locates decedent "immediately" before the collision on the wrong side of the road. This means that the jury gave greater credibility to the truck driver's testimony than to that of Goss, plaintiff's principal witness. The

testimony of Goss supported her theory that decedent was on the right side of the road for the entire interval of three seconds after the truck driver "crested" a hill, south of the scene, and saw decedent's headlights for the first time.

This being so, the question of "proper lookout" is inconsequential. That theory of negligence presupposes that the truck driver did not see decedent's car in the south bound lane and veered into it without "justification or excuse." But the jury decided decedent's car was not in the south bound lane until he turned it from the north bound lane as the truck driver, in a quick response to the emergency decedent created, also turned into that lane.

We conclude that the District Court's error is not ground for a retrial, since we have decided that the error does not affect a substantial right of plaintiff.[1]

The judgment is AFFIRMED.

---

[1]Fed. R. Civ. P. 61.

HASTINGS, *Chief Judge.* I concur in the result reached in this case.

I do not agree that the trial court erred in refusing to give plaintiff's tendered instructions Nos. 9 and 10. No. 9 merely is an abstract statement of the law that the operator of a motor vehicle upon a public highway is required to maintain a reasonable lookout for other traffic on the highway and that failure to do so would constitute negligence. No. 10 is a peremptory instruction based upon the same rule applied to this case.

The jury answered three special interrogatories favorably to defendant, as follows:

"Interrogatory Number 1:

"As the passenger car operated by the deceased approached the scene of the accident, was it at any time in the northbound lane of traffic?

"Yes.

"Interrogatory Number 2:

"If your answer to the foregoing interrogatory is in the affirmative, did the deceased immediately before the collision turn his motor vehicle from the northbound lane of traffic on to or across the center line of the highway?

"Yes.

"Interrogatory Number 3:

"Did the defendant's driver turn to his left onto or across the center line of the highway immediately before the collision?

"Yes."

(Opinion)

I agree with the trial court that the instructions with respect to lookout should not have been given for the reason that there is no evidence in the record and no special issue raised by the pleadings tendering the issue of "reasonable lookout" for the jury to pass upon. This was well settled in Indiana in *N. Y. Cent. R.R. Co.* v. *Perkins*, 125 Ind. App. 320, 122 N.E. 2d 141, on petition for rehearing, 122 N.E. 2d 738 (1954). Indeed, in that case the court held it reversible error to deny an instruction withdrawing the issue of lookout from the jury.

Assuming, *arguendo*, that Instructions Nos. 9 and 10 were proper and should have been given, then I agree that the failure to do so was not prejudicial error under the facts of this case.

This appeal presents a clear case of contributory negligence as a matter of law on the part of plaintiff's decedent, and under these circumstances plaintiff may not recover. *Gamble* v. *Lewis*, 227 Ind. 455, 463, 85 N.E. 2d 629, 634 (1949). *Cf. Lee* v. *Terminal Transport Company*, 7 Cir., 269 F. 2d 97, 99 (1959).

In another Indiana diversity case, where a skidding truck created an emergency situation and defendant's driver was charged with failing to observe it coming across the highway, we held that as a matter of law defendants were not guilty of actionable negligence. *Martin* v. *United Moving and Storage Company*, 7 Cir., 262 F. 2d 596, 600 (1959).

(Opinion)

No. 13521

SCHNACKENBERG, *Circuit Judge*, dissenting.

Judge Kiley recognizes that there was evidence to support two instructions tendered by plaintiff which would have informed the jury of the duty of an operator of a motor vehicle to maintain a reasonable lookout for "other traffic on the highway" and that failure to do so would be negligence. He admits that the district court erred in rejecting these instructions, and I agree with that conclusion.

However, with such evidence admittedly in the record, the answers made by the jury to three special interrogatories, referring to the movement of decedent's car into the "wrong" lane and back into the "right" lane, indicate that the ultimate question of which driver caused the collision presented to the jury a particularly difficult question. Therefore plaintiff was entitled to have the law applicable to that situation presented to the jury in the two instructions which were rejected by the court. I agree with Judge Kiley that the rejection was error but I do not agree that it was not prejudicial. It destroyed plaintiff's chance for recovery. It left the jury groping in the dark as to the law applicable to a sensitive part of the case. The answers to the interrogatories are not inconsistent with a verdict for plaintiff.

I would reverse and remand for a new trial.

A true Copy:

Teste: .....

Clerk of the United States Court of Appeals for the Seventh Circuit.